No. 14204.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

ZAGON, AARON & SANDLER,
By NELSON ROSEN,
6253 Hollywood Boulevard,
Los Angeles 28, California;

W. I. GILBERT, JR.,
458 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

Cases

Statute

Textbook

No. 14204.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

Since the filing of petitioner's opening brief herein on April 28, 1954, this Court has rendered its decision in *Rudolf B. S. Myers v. Commissioner,* Case No. 13822, decided May 10, 1954. By said decision, this Court has concurred and joined with the 2nd and 3rd Circuits (*Baker v. Commissioner* (2d Cir.), 205 F. 2d 369; *Smith's Estate v. Commissioner* (3d Cir.), 208 F. 2d 349) in rejecting the reasoning which the Tax Court employed in the case at bar, as well as in the three cited cases, in holding that the alimony payments involved were not deductible by the husband-taxpayers concerned.

Upon the authority of these decisions, it is respectfully submitted that the decision of the Tax Court in this case holding that the alimony payments made by petitioner were not deductible by him should be reversed.

Respondent, in his brief at pages 22 and 23, in referring to the decision of this Court in *Rudolf B. S. Myers, supra,* states:

> "This Court, in its recent decision in *Myers v. Commissioner,* decided May 10, 1954, reversed the Tax Court and held that the payments were deductible by the husband where, as the taxpayer contended, the husband's obligation would cease upon the wife's remarriage or on the death of either party."

While the taxpayer in the *Myers* case did make such contentions, the language of this Court's decision indicates that it was not based upon these contentions of taxpayer, but rather was based upon the fact that no principal sum was specified in the agreement involved. The agreement in the *Myers* case, in paragraph seven thereof, provided that the husband would pay to his wife for her support "the sum of Two Hundred Fifty Dollars ($250.00) a month, in advance, during the period commencing on June 1, 1945, and continuing until May 31, 1951, * * *." The Tax Court, in reaching the conclusion that a principal sum was specified, reasoned that it was immaterial that the amount to be paid was set forth in specified monthly payments rather than as a total figure, relying upon its previous decisions in *Frank P. Orsatti,* 12 T. C. 188; *Harold M. Fleming,* 14 T. C. 1308, and *J. B. Steinel,* 10 T. C. 409. This Court, in reversing the Tax Court, did so for the clear and unequivocal reason expressed in the following language:

> "The Tax Court's holdings were clearly erroneous. No principal sum was specified in the seventh paragraph of the agreement of June 1, 1945. Therefore the 24 payments mentioned above were not installment payments discharging a part of an obligation the principal sum of which was so specified."

This language is equally applicable to the case at bar, except that in the case at bar the decree superseded the property settlement agreement of the parties, and there was no principal sum specified in said decree. It is to be noted that whereas in the *Myers* case the divorce decrees merely "approved, and required the parties to comply with, the agreement of June 1, 1945," in the case at bar the decree went further and actually adopted and made the agreement a part of the decree [R. 108]. Under the decisions referred to in petitioner's opening brief at pages 31 and 32, it is clear that the property settlement agreement and the promissory notes executed as a part thereof were merged into and superseded by the decree, and that the decree and not the property settlement agreement determined and fixed the rights and obligations of the parties. Respondent, in his brief, has not questioned petitioner's argument and authorities in this respect. The Tax Court itself has recognized this principle in numerous cases involving the interpretation and application of the federal estate tax.

In *Edythe C. Young,* 39 B. T. A. 230, at 234 and 235, the Court stated in part:

> "Even if the parties have settled their property rights, and have made provision for the support of the wife by a written agreement, the court may disregard the agreement and award such alimony as it deems right. In such case the right to alimony is predicated on the action of the court and not upon the agreement of the parties. * * *
>
> * * * * * * * *
>
> "* * * Neither the obligation, nor the amount thereof, was created or determined by the agreement of the parties. The law imposed the one and the decree of court determined the other."

See, also, *Estate of Maresi,* 6 T. C. 582 (and numerous cases therein cited), affirmed in *Commissioner of Internal Revenue v. Maresi* (2d Cir.), 156 F. 2d 929, wherein the Court of Appeals concluded that alimony allowances are founded upon the decree of the Court and not the agreement of the parties, where the agreement is incorporated into the decree of divorce. This conclusion was approved by the United States Supreme Court, in *Harris v. Commissioner,* 340 U. S. 106, 71 S. Ct. 181, at 184, wherein the Court stated:

> "The decree, and not the arrangement submitted to the court, would fix the rights and obligations of the parties. That was the theory of Commissioner of Internal Revenue v. Maresi, 2 Cir., 156 F. 2d 929, and we think it sound."

The respondent, in his brief at page 21, concedes that in this case neither the decree nor the agreement specified a principal sum, stating as follows:

> "Consequently, although *the agreement of the parties and the divorce decree* did *not* state the ultimate amount payable, the taxpayer had a simple, unconditional obligation to pay to his wife a total of $26,500 through monthly payments of $500 extending over a 53-month period." (Emphasis ours.)

This concession brings the instant case squarely within the holding of this Court in the *Myers* case, even though the respondent seeks to ignore the undisputable fact that the decree ordered the payment of a *single* monthly sum of not more than $800 nor less than $500 per month, during the prescribed period [R. 107].

Whereas the agreement in the *Myers* case specified an obligation to pay the sum of $500 per month, free from

any conditions which might change the amount of any particular monthly payment, the decree in the case at bar is far more flexible, variable and uncertain in its requirements in that under its terms it was contemplated that the amount of each monthly payment might fluctuate and change, depending upon the petitioner's earnings from his radio employment.

To the extent that the Court's decision in the *Myers* case might have been induced, if at all, by the taxpayer's contentions that his obligation would cease upon the wife's remarriage or on the death of either party, such contentions are equally applicable to the case at bar. The decree provides for the payments to be made to the taxpayer's former wife, and there is nothing in the decree which indicates that payments would be continued in the event that the wife remarried or either of the parties died prior to the completion of such payments. (See, 27 C. J. S. 999, 1090; *Foy v. Smith's Estate,* 58 Nev. 371, 81 P. 2d 1065; Nevada Compiled Laws 1929, Sec. 9465.)

However, it is unnecessary to consider these questions in this case in view of the fact, first, that the decree did not specify a principal sum and, secondly, the monthly payments which were required by the decree were expressly subject to condition and fluctuation as to amount, depending upon the future income of the petitioner.

It is therefore respectfully submitted that the monthly payments made by the petitioner in this case to Mrs. Fidler commencing with the month of April, 1944, through and including the month of December, 1946, were periodic payments received by Mrs. Fidler subsequent to the decree of March 20, 1944, in discharge of an obligation which, because of the marital relationship, was imposed upon and incurred by petitioner under the decree of March

20, 1944. Therefore, they were includible in Mrs. Fidler's gross income and were deductible in computing petitioner's net income for 1944, 1945 and 1946.

With respect to the loss which petitioner sustained in connection with the sale of literary properties, the evidence is undisputed that petitioner purchased said properties with the intention and purpose of immediately offering them for sale to prospective purchasers thereof. He received no income from said properties during the time that he held them. He did not acquire them with the intent to hold them while they appreciated in value, so as to be able to sell them at a later date and realize the appreciation in value which might have occurred in the meantime. It was his intention to immediately offer them for sale, and he did so, through the offices of his agent, Mr. Bentel. Under the authorities cited in petitioner's opening brief, the important factor in cases of this kind is the intent with which and the purpose for which the property is acquired and held. The fact that petitioner was wholly unsuccessful in his efforts to sell in any of the properties does not necessarily mean that such properties constituted capital assets.

Under the authorities cited in petitioner's opening brief, it is expressly submitted that the holding of the Tax Court with respect to this issue is also erroneous and should be reversed by this Court as being contrary to the undisputed evidence introduced in the trial of this case.

Respectfully submitted,

ZAGON, AARON & SANDLER,
By NELSON ROSEN,
W. I. GILBERT, JR.,
Counsel for Petitioner.